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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

JANET RENO, ATTORNEY GENERAL
OF THE UNITED STATES, *ET AL.*, *Appellants*

v.

AMERICAN CIVIL LIBERTIES UNION, *ET AL.*, *Appellees*

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

BRIEF OF MEMBERS OF CONGRESS

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JESSE HELMS CHARLES GRASSLEY CHRISTOPHER BOND
JAMES INHOFE RICK SANTORUM ROD GRAMS
and
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INTEREST OF *AMICI CURIAE*

Amici Curiae Members of Congress are listed on the cover and are United States Senators and Representatives who voted for and were instrumental in the passage of the law under review, the Communications Decency Act of 1996, and wish to present their unique views on the law to this Court and assist the Court in upholding this important law on its face.

CONSENT TO FILE BRIEF

Consent was granted by all parties for the filing of this Brief of Members of Congress as *Amici Curiae* in Support of Appellants by counsel of record for the Attorney General, the ACLU Plaintiffs, and the American Library Ass'n Plaintiffs.

THE ACT AND THE DECISIONS BELOW

The Communications Decency Act of 1996 ("CDA") was passed by the United States Congress on February 1, 1996, and signed into law by the President on February 8, 1996. This is a facial challenge to the CDA's offenses and defenses for using a telecommunications device or interactive computer service or facility to knowingly send or display indecent material to minor children, 47 U.S.C. §§ 223(a)(1)(B), (a)(2), and 223(d)-(h). The Act also updated, but no challenge was brought against, two obscenity statutes, 18 U.S.C. §§ 1462 and 1465. *See* Communications Decency Act of 1996, Title V of the Telecommunications Act of 1996, Pub. L. No. 104-104 (S. 652), 1996 U.S.C.C.A.N. (110 Stat.) 133-43.

The Conference Report on the CDA is a statement of the intent of Congress. *See Joint Explanatory Statement of the Committee of Conference*, Report for Pub. L. No. 104-104, reprinted at 1996 U.S.C.C.A.N. Leg. Hist. 200-11.

The decision under review is reported as *ACLU, et al. v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996) (June 11, 1996). A related decision is *Shea v. Reno*, 930 F. Supp. 916 (S.D.N.Y. 1996) (July 29, 1996), appeal stayed, No. 96-595.

SUMMARY OF ARGUMENT

These *amici* submit that this Court should interpret, construe, and declare the indecency sections of the CDA as constitutional, valid, and enforceable. Failure to recognize the power of Congress to extend reasonable protections for minor children to interactive computer services, including the Internet, would result in a serious departure from established law and cause a fundamental reversal in the way in which law and society handle children's access to pornography.

The District Court below misinterpreted the indecency test to be so broad that it could reach virtually any sexual speech, regardless of its specific context, purpose, or intent, and thus made the CDA appear unconstitutional.

Amici ask this Court to properly interpret the CDA as adopting a narrow test for indecency that does not reach serious expression that should be protected for adults, and thereby recognize its constitutionality.

This Court should find that the indecency standard, as tailored to this medium of communication, is a facially valid test for identifying patently offensive representations of sexual and excretory acts and organs that should be restricted from children and would not, in context, restrict legitimate, serious sexual works. Congress adopted a medium specific standard for online indecency and this Court can recognize that the scope of such indecency for the CDA does not restrict materials that are worthy of protection online. Judgments as to specific violations, defenses, compliance methods, or the nature of particular communications are evidentiary, as applied, factual considerations that should be reserved for case-by-case contextual analysis in actual cases or controversies.

The District Court created, in effect, a previously nonexistent license to knowingly send indecent pornography directly to known children and to knowingly display it to minor children on computer networks without taking any good faith steps to restrict it from their access. If allowed to stand, this ruling would force this nation's federal and state legislatures to surrender their compelling interests in protecting children from

pornography, in favor of the economic interests and ideological wishes of computer pornography providers, leaving them unburdened and untroubled even by reasonable responsibilities for their pornography reaching children. This result is being increasingly exacerbated by the uniquely pervasive nature of the medium and the growing accessibility that America's children have to interactive computer networks, both at home and, more often, outside the home and outside parental control. This unique accessibility to children will only increase with the Government's incentives for helping schools provide Internet access to all students, and with libraries providing free, unsupervised Internet access to children of all ages.

Adults should not be granted an absolute First Amendment right to use the Internet to knowingly send or make indecency available to minor children, just as they cannot use billboards or magazine racks to knowingly sell or display pornography to minor children. Indecent material may be protected expression among adults, as this Court has said, but indecent and harmful material is not necessarily protected from restriction when disseminated to children, as this Court has also said.

The focus of this Court should not be on whether adults who wish to show patently offensive sexual or excretory depictions would find it bothersome to restrict them from minors. Instead, this Court must decide whether the provider of such patently offensive material should be relieved of all burden of making any good faith effort to restrict his indecency from children, in light of the compelling interest that government and all of society have in protecting minor children from premature exposure to patently offensive pornography.

Amici suggest that three actions should be taken by the Court in this appeal from the preliminary injunction:

1. Reverse the unprecedented decision below that this Court's test for indecency and patent offensiveness is unconstitutionally vague and overbroad and uphold the CDA as adopting the medium specific, constitutionally valid test of online indecency for telecommunications devices and for the Internet and other interactive computer services.

2. Reverse the decision below that 47 U.S.C. § 223 (a)(1)(B) and (a)(2) are invalid for using the standard of indecency and uphold this section as creating a valid offense of knowingly using a telecommunications device to send indecent messages directly to a known, minor recipient.

3. Reverse the decision below that 47 U.S.C. § 223 (d)(1) and (d)(2) are facially invalid in all respects and make four separate findings: (1) uphold subsection (d)(1)(A) as creating a valid offense of using an interactive computer service to knowingly send online indecency to a specific minor; (2) uphold subsection (d)(1)(B) as creating a valid offense of knowingly displaying online indecency in a manner available to minors on commercial sites or services, without taking good faith steps under available technology to restrict access by minors to such indecency; (3) uphold subsection (d)(1)(B) as creating a facially valid offense as to persons who knowingly display online indecency in a manner available to minors without taking any good faith steps under available technology to restrict access by minors to such indecency; and (4) uphold (d)(2) as creating a valid offense as to interactive computer service owners and operators who knowingly permit the facilities under their control to be used for the known sending of indecent material to specific minors or for the known display of indecency in a manner that is available to minors, without taking any available good faith action to restrict it from minors.

Amici also submit that the record of the preliminary injunction hearing below does not conclusively establish that pornography distributors cannot take reasonably effective steps online to restrict their indecency from children while making it available to adults and was, therefore, incomplete, inaccurate, and misleading. The seriousness of striking down the Act's provisions without complete discovery and full disclosure of facts concerning technically feasible and possible technologies for compliance with the CDA would at least warrant a remand for reconsideration and a rehearing or trial on the merits, rather than an affirmance on this record.

LAW AND ARGUMENT

I. THE CDA'S INDECENCY TEST IS A VALID AND PROPER STANDARD TO SEPARATE PROTECTED SPEECH FROM "ONLINE INDECENCY" THAT IS UNPROTECTED FOR MINOR CHILDREN.

In its Conference Report on the CDA, Congress described the offenses added by the Act to protect minor children from online indecency, *see* Conf. Rep. at 188, 1996 U.S.C.C.A.N. at 201-02:

> New subsection 223(d)(1) applies to content providers who send prohibited material to a specific person or persons under 18 years of age. Its "display" prohibition applies to content providers who post indecent material for online display without taking precautions that shield that material from minors. . . . Defenses to violations of the new sections assure that attention is focused on bad actors and not those who lack knowledge of a violation or whose actions are equivalent to those of common carriers.[1]

The District Court below found the CDA unconstitutional on its face for two main reasons, separately discussed by each of the three judges sitting on the panel. The first was that the test for "indecency" and "patent offensiveness" was unconstitutionally vague and overbroad and would totally ban indecent speech for adults and some speech protected even as

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[1] Note the similarity in the language of Congress to that of this Court in *Mishkin v. New York*, 383 U.S. 502, 510-11 (1966), that "[i]t is not innocent but *calculated purveyance* of filth which is exorcised," in describing the *scienter* requirement of being "aware of the character of the material" as one that "fully meets the demands of the Constitution," a holding repeated in *Hamling v. United States*, 418 U.S. 87, 119-24 (1974) (noting, at 121, the emphasis in the original).

to minors.[2] The second was that the CDA was not a least restrictive means because existing protocols and practices on the Internet, Usenet, and World Wide Web made compliance difficult or impossible for potential providers of indecency.[3]

This Court can address both of these perceived defects by recognizing the test for indecency for interactive computer services and telecommunications devices as a uniquely suited test for online indecency and recognizing the broadly flexible compliance defenses for the various components of the interactive computer media.

Amici recognize that a standard of online indecency for interactive computer services that are available to minors would be more permissive than broadcast indecency and would allow unrestricted availability of anything that can be aired on radio or TV, or lawfully sold or displayed to a minor in a store, on a billboard, on one's jacket in public, or provided to a minor by phone, fax, mail, cable, or in a school, museum, or library.[4] Congress's Conference Report on the CDA demonstrates just

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[2] *See ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996) (two judges finding facial vagueness and all three concluding overbreadth). *But see Shea v. Reno*, 930 F. Supp. 916 (S.D.N.Y. 1996) (finding statutory overbreadth possible, at 24-26, but not vagueness for indecency, at 20-24).

[3] *See* Findings of Fact and opinions of all three judges below. *See also*: similar findings as to overbreadth by N.Y. court, 930 F. Supp. at 25-34.

[4] *See FCC v. Pacifica Foundation*, 438 U.S. 726, 750 (1978), *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *Ginsberg v. New York*, 390 U.S. 629, 636, 641 (1968); *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 394-98 (1988), 488 U.S. 905 (1988) (on remand, Va. display law upheld as construed by Va. Sup. Ct., 882 F.2d 125 (4th Cir. 1989)), *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975), *Interstate Circuit v. Dallas*, 390 U.S. 676 (1968), *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981); *Cohen v. California*, 403 U.S. 15, 20 (1971); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Hannegan v. Esquire*, 327 U.S. 146 (1946), *Lamont v. Postmaster General*, 381 U.S. 301 (1965), *Bigelow v. Virginia*, 421 U.S. 809 (1975), *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983); and *Board of Education v. Pico*, 457 U.S. 853, 870-72 (1982).

such an expectation[5] and this Court's precedent protects such a level of expression, even to minors, without violating the indecency standard.[6] This is not so for broadcast indecency, which is the broadest test for indecency and covers a wider breadth of sex and nudity because it is designed to protect both minors and unconsenting adults over radio and TV. *See FCC v. Pacifica Foundation*, 438 U.S. 726, 748-50 (1978). The CDA chose the less restrictive measure of only prohibiting the knowing transmission or display of indecent material to minors, not unconsenting adults, so the offense is narrower than under 18 U.S.C. § 1464 and differs markedly from broadcasting law. Unlike for broadcasting, adults are not protected by the CDA even if they inadvertently access online indecency. This Act requires only the protection of minor children.[7]

Online indecency was not intended and should not be held to have the same scope as broadcast indecency and the two standards are not co-extensive. Adults under the CDA need not avoid all the sex and nudity that would be prohibited or restricted to safe harbor hours on radio or TV under the broadcast standard of indecency and its enforcement policies. Adults need only avoid sending to children, or displaying to minors on sites that are available to children, that type of explicit sexual depiction or description that constitutes "online indecency" because its offensiveness is patently clear under the

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[5] Conf. Rep. at 188-89, 190-91, 1996 U.S.C.C.A.N. Leg. Hist. 202-05. *See also* 141 CONG. REC. S.9770-75 (daily ed. July 12, 1995) (statements and letters of original sponsor, Senator James Exon); 141 CONG. REC. S.8328, 8337, 8386, *et seq.* (daily ed. June 14, 1995) (Senate debate and CDA passage, 84-16, by the Exon -Coats Amendment)

[6] *See Denver Area Ed. Tel. Consortium v. FCC*, __ U.S.__, 116 S. Ct. 2374, 2387, 2389-90, 135 L.Ed.2d 888 (1996).

[7] Especially when a law is aimed only at protecting minors, but puts reasonable limitations or responsibilities on adults to protect them from material that would be lawful if kept between adults only, the balance can be struck in favor of children, since the material is not protected as to them. *See Ginsberg v. New York*, 390 U.S. at 636 ("[M]aterial which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children.").

circumstances when considering the host of variables of value, intent, prurience, purpose, audience, subject matter, etc. As such, the type of pornographic indecency that is unlawful to display to minors online encompasses all that would be unlawful to display or sell to minors in all public streets, places, and stores. However, what could lawfully be available to all adults and even children online can include any seriously valuable sexual material that would not be indecent online, even if it could be unlawful to broadcast (if indecent for unconsenting adults and children) or prohibited from display in a commercial store or public place (if harmful to minors). Therefore, the federal standard of "online indecency" is not more restrictive than the state standard of "harmful to minors" and can be less so when considered "in context."[8]

It should be noted that the online indecency standard provides even more latitude to consider serious literary, artistic, political, and scientific value for adults, since it is based on the second prong of the "*Miller*" obscenity test,[9] than would the state "harmful to minors" standard, which is based on a variable standard that considers what is offensive in light of what is suitable for minors and what prurience and value it

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[8] Properly understood, the online indecency standard can clarify much misunderstanding among potential parties wishing to comply with the law. Rep. Rick White, in offering a CDA alternative bill in Conference for the House, chose the harmful to minors test, instead of indecency, thinking it would be a more accepted test in the Internet community, while admitting that the practical result of each test would be the same. *See* Transcript Before the Joint Conferees on S.652, Dec. 6, 1995, p. 25, lines 14-22 (unpublished, but on public file for inspection, in Dirksen Senate Office Building, Room 508) (Rep. White: "We adopt instead of the indecency standard, called for in Mr. Hyde's proposal, we use the standard that has been used in 48 states, known as the harmful-to-minors standard. It accomplishes the same thing, but it provides a lot more certainty so that people who put these sort of materials on the Internet know whether they are going to be subject to liability or not.").

[9] As construed in *Pacifica*, at 750, to require consideration of serious value in appropriate circumstances. Congress recognized the interactive computer media as such a setting, as did this Court with cable TV in *Denver Area*, 116 S. Ct. at 2389-90.

would have only in relation to minors. *See Miller v. California*, 413 U.S. 15, 24-25 (1973); *Ginsberg v. New York*, 390 U.S. 629, 634 (1968).[10]

The court below mistakenly arrived at just the opposite conclusion and found that Congress adopted a more broadly encompassing test with indecency than it would have with harmful to minors.[11] This misinterpretation alone warrants reversal of the District Court's opinion that Congress should have no power to protect children by use of the indecency standard for any regulation of telecommunications devices and interactive computer services.[12]

The court below failed to read the law as this Court required in *Pacifica* and created a hypothetical overbreadth that was unwarranted by the plain words of the statute and

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[10] Another difference between "online indecency" and "harmful to minors" is in the structure of the test and the burden of proof. Since reasonable minds of average adults can agree that a particular treatment of sex or nudity is "patently" offensive, because it exceeds the customary limits of candor in that medium, and is devoid of serious value or purpose or is pandered as prurient pornography, then its "indecency" can be evident for the medium under consideration and in that context. Similarly, material "harmful to minors" would be illegal to provide to minors anywhere off-line. For indecency, patent offensiveness is determined in the context of a "host of variables" and the trier of fact would be instructed that it must consider the presence or absence of value and could consider any evidence of pandering in order to reach its judgment as to whether it was patently offensive under those circumstances. For a state harmful to minors case, all three prongs are found separately and only in relation to minors.

[11] *See* 929 F. Supp. at 855, n. 1 (Sloviter, C.J.), at 859 (Buckwalter, J.), and at 873 n. 16 (Dalzell, J.) (*See also id.* at 882, anticipating the death of *Pacifica* and giving hypothetical "decency" acts by Congress that presumably would be applied to heretofore protected materials. It bears comment that those same materials exist now in harmony with state harmful to minors laws and if they aren't harmful to minors, they could not be indecent to adults.).

[12] As the lower court stated, "Congress may not regulate indecency on the Internet at all." 929 F. Supp. at 877.

made the CDA falsely appear unconstitutional. Faithfulness to *Pacifica* would have avoided such a result.[13]

A faithful application of *Pacifica* and *Denver Area,* recognizing the true capabilities and knowledge of the parties and accepting the true nature of the test, is illustrated in the recent decision of another three-judge court hearing a challenge to certain cable TV provisions in the CDA and finding the harm to children a serious matter warranting Government attention toward the most egregious offenders who are well aware of the type of sexual exploitation materials within the meaning of indecent. *Playboy Entertainment Group, Inc. v. United States*, 945 F. Supp. 772 (D. Del. 1996).

A reasonable understanding of the test for "online indecency" for the Internet and other computer and telecommunications systems, would be to recognize that the CDA's use of the indecency standard is in a specific contextual fashion that is uniquely applicable to these interactive computer services and networks, as Congress intended. In this regard, this Court need not "construe" the statute so as to change it, but only to read it within its constitutional scope, as the Court did in *Pacifica*, and make clear its lawful and intended reach.[14] These *amici* submit that the court below "construed" the law and did change its plain meaning, but did so in a way that improperly expanded its sweep and, by doing so, the District Court created a perceived overbreadth that is beyond the scope of the test mandated in *Pacifica* and intended by Congress to be the standard for the CDA. This Court, therefore, is faced with resolving this conflict and should uphold the law within its proper limits and for its intended and necessary purposes.

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[13] As this Court illustrated a fortnight later in *Denver Area, supra.*

[14] This type of clarifying construction to a federal statute's properly intended scope has a long history for First Amendment sensitive laws. This Court announced *scienter* principles in *Smith v. California*, 361 U.S. 147, 154 (1959), and *Mishkin v. New York*, 383 U.S. 502, 510-11 (1966), and the test for obscenity in *Miller v. California*, 413 U.S. 15, 24-25 (1973), and then clarified that they were incorporated into federal law in *Hamling v. United States*, 418 U.S. 87, at 119-24 and 110-15 (1974).

As mandated in *Pacifica*, 438 U.S. at 750, the use of the indecency standard in any medium is "rested entirely on a nuisance rationale under which context is all-important." This concept of "context" was explicitly incorporated into the CDA by Congress, in recognition of the following holding of the Court in *Pacifica, id.* (emphasis added):

> The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience, and the differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant.

The indecency standard, as thus interpreted by this Court and applied by the FCC, "does not by any means reduce adults to hearing only what is fit for children," *id.* at 750 n. 28, since consenting adults can obtain indecent materials at stores and theaters and at times or under circumstances where the dissemination of the offensive material may not be "indecent" or may be channeled to adults or by a safe harbor policy.

Amici submit that Congress made its intent and understanding clear in the "Conference Report on the CDA" by stating that this law was adopting a standard of indecency for online services that was particularly sensitive to the presence of serious value:

> The conferees intend that the term indecency (and the rendition of the definition of that term in new section 502 [§ 223 (d)(1)(B)]) has the same meaning as established in *FCC v. Pacifica Foundation*, . . . and *Sable Communications of California, Inc. v. FCC*, . . . that the indecency standard is . . . specifically limited in its reach so that the term is not unconstitutionally vague. . . . [citing Circuit indecency cases]
>
> The precise contours of the definition of indecency have varied slightly depending on the communications medium to which it has been applied. The essence of the phrase—patently offensive descriptions of sexual and excretory activities—has remained constant, however.

The conferees considered, but rejected, the so-called "harmful to minors" standard. *See Ginsberg v. New York.* . . . The proponents of the "harmful to minors" standard contended that that standard contains an exemption for material with "serious literary, artistic, political, and scientific value," and therefore was the better of the two alternative standards. . . . This assertion misapprehends the indecency standard itself, and disregards the Supreme Court's various rulings on this issue. *See Pacifica* . . . at 743, n. 18, and its progeny.

The gravamen of the indecency concept is "patent offensiveness." Such a determination cannot be made without a consideration of the context of the description or depiction at issue. It is the understanding of the conferees that, as applied, the patent offensiveness inquiry involves two distinct elements: the intention to be patently offensive, and a patently offensive result. . . .[citing FCC rulings] Material with serious redeeming value is quite obviously intended to edify and educate, not to offend. Therefore, it will be imperative to consider the context and the nature of the material in question when determining its "patent offensiveness."

[U]se of the indecency standard poses no significant risk to the free-wheeling and vibrant nature of discourse or to serious, literary, and artistic works that currently can be found on the Internet, and which is expected to continue and grow. As the Supreme Court itself noted when upholding the constitutionality of indecency prohibitions, prohibiting indecency merely focuses speakers to re-cast their message into less offensive terms, but does not prohibit or disfavor the essential meaning of the communication. . . . Likewise, requiring that access restrictions be imposed to protect minors from exposure to indecent material does not prohibit or disfavor the essential meaning of the indecent communication, it merely puts it in its appropriate place: away from children.
[Conf. Rep. at 188-89, 1996 U.S.C.C.A.N. Leg. Hist. at 202-03, Citations omitted.]

The enactment of the CDA with the federal indecency standard was not, therefore, a rejection of the serious value prong of the "harmful to minors" test. Congress adopted an even less restrictive test with indecency, since only a lack of serious value for minors is relevant to the state standard whereas indecency considers serious value for adults as well as minors. The presence of truly serious value or purpose is a significant factor in a finding that a presentation does not offend or was not intended to offend. Conversely, that which is "pandered" for its prurience could be found not to be offered for a serious purpose or for any serious value. [15]

Under the "online indecency" test, the Government need not affirmatively prove the presence of prurience or lack of serious value. However, the trier of fact must nevertheless consider the presence of value and, in addition, may consider any evidence of pandering to prurient interests in determining the patent offensiveness of the material in the specific factual context of the "host of variables" that are inherent in the legal "term of art" the law calls "indecency."[16]

Therefore, this Court can recognize that online indecency is a medium specific standard for the CDA and is a proper synthesis of the "host of variables" in a nuisance rationale, as required by *Pacifica* and *Denver Area*, such as the following:

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[15] Evidence of pandering to prurience can distinguish obscene, patently offensive, pornography from serious, protected works. *See Ginzburg v. United States*, 383 U.S. 463, 466-67, 471-74 (1966), *Hamling v. United States*, 418 U.S. 87, 127-29 (1974), *Splawn v. California*, 431 U.S. 595, 598 (1977), *Pinkus v. United States*, 436 U.S. 293, 303-04 (1977).

[16] Judge Dalzell below, 929 F. Supp. at 865-66, noted the reference in *Sable* at 132, that "Pornography is normally either obscene or indecent," and noted on his own "obscenity (commonly understood to include so-called hardcore pornography)" and that he uses the word pornography to refer to the type of sexually explicit, "adult" material similar to that at issue in *Sable*. The term does have a common usage and universal meaning that comports with the character of obscenity and indecency. *See also* Bruce Taylor, *Hard-Core Pornography: A Proposal For A Per Se Rule*, 21 U. MICH. J.L. REF. 255 (1988).

"Online indecency" means any communication that, "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs". Any determination of patent offensiveness must consider the presence, lack, or inherent involvement of the following host of variables: any serious literary, artistic, political, or scientific value inherent in the material itself; any serious literary, artistic, political, or scientific purpose to which the material was intended or used by the communicator; the time, place, and manner of the communication; the content, theme, and context of the material in relation to its subject matter, program, forum, and manner of presentation; the composition and age of the audience; the pervasiveness of the medium used and its availability to minor children under the circumstances; any evidence of intention to be patently offensive; and any evidence of pandering or exploiting a prurient interest in nudity, sex, or excretion in the creation, marketing, or dissemination of the material.

As used, the CDA's indecency test for online computer services need not make each variable a separate element, but clarifies that it is the totality of the circumstances that shall be considered in making the ultimate determination of whether the communication was "patently offensive" in the context in which it was made, disseminated, and received.[17] One need not pre-judge its application in every future or hypothetical circumstance to know that the fairness of the result will be governed by the mandate that each future judgment be guided by constitutional principles, such as "beyond reasonable doubt"

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[17] Indeed, Judge Buckwalter below mentions several of the variables required for consideration "in context" of patent offensiveness, 929 F. Supp. at 864, but fails to incorporate them into the test for "indecency," even though he recognized that the standard could be so construed, *id.* at 861-62 ("Therefore, I will acknowledge that the term indecency is 'reasonably susceptible' to the definition offered in the Conference Report and might therefore adopt such a narrowing construction if it would thereby preserve the constitutionality of the statute.").

and "presumption of innocence", or an objective rule such as the "reasonable man" of fact finding.[18]

Such a judicial melding of the generic definition with its constitutional considerations is faithfully consistent with this Court's development of the tests for obscenity, child pornography, harmful to minors, and indecency, and with the intent of Congress as expressed in the CDA and its accompanying Conference Report. This would accomplish the same sensitivity to First Amendment values and allow this test to be used, like that for obscenity and harmful to minors, as a constitutionally valid method of separating protected speech, that may be freely and openly distributed to everyone online, from patently offensive sexual and excretory depictions that are indecent in the online context and clearly inappropriate for knowing transmissions or displays to minor children.

This is the mandate of *Pacifica*. As the Conference Report explains, it is also the affirmatively expressed intent of Congress in adopting the indecency test of *Pacifica* for the computer medium. In determining whether material is patently offensive in the context of interactive computer services, and therefore meets the test for online indecency, courts and triers of fact must consider its offensiveness in the context of the host of variables mandated by this Court in *Pacifica* and *Denver Area*, including the presence of serious value or purpose and, if evident, any pandering to prurient interests.[19] As such, the CDA would not reach legitimate and serious

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[18] As stated in *Miller v. California, supra*, 413 U.S. at 26 n. 9: "The mere fact juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged." As also observed in *Roth v. United States*, 354 U.S. 476, at 492 n 30 (1957), 'it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system.'"

[19] Prurient appeal may not be "an essential component of indecent language," as stated in *Pacifica*, at 741, but evidence of pandering to prurience can negate a false claim of serious value or purpose. *See Ginzburg v. United States*, 383 U.S. 463, 465-76 (1966); *Hamling, supra*, 418 U.S. at 130; *Splawn v. California*, 431 U.S. 595, 597-98 (1977).

sexual information that should be protected, as the Government properly represented below.[20]

The CDA is *not* a total ban on indecency, and should not be interpreted to have the same effect as a ban.[21] In contrast, the CDA criminalizes the knowing transmission of indecent material to a specific minor child and the knowing display of indecent material to minors. The offenses in this Act require an offender to act "knowingly" by knowing of the sexually explicit character of the communication and knowing that it is going to or is available to minors. This dual *scienter* element further narrows the reach and scope of the law, since it prevents totally innocent or mistaken transmissions to minors, even if indecent. *Ginsberg v. New York*, 390 U.S. 629, 644 (1968); *Hamling v. United States*, 418 U.S. 87, 119-24 (1974); *Osborne v. Ohio*, 495 U.S. 103, 113 n.9, 115 (1990); *U.S. v. X-Citement Video, Inc.*, __ U.S. __, 115 S. Ct. 464, 130 L.Ed.2d 372 (1994).

II. THE CDA'S RESTRICTIONS ON PROVIDING INDECENCY TO MINORS ARE COMPELLED BY THE NEED TO PROTECT CHILDREN.

The CDA is carefully tailored to do no more than is necessary to further the compelling interest in protecting children from accessing online indecency.

Sexually explicit images are undeniably present and available online, and pornographic repositories tend to be heavily accessed making it more freely available over the Internet than in other mass communications media in the

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20 929 F. Supp. at 857, 863, 870-71.

21 The CDA is not like the indecent dial-a-porn statute that was before the Court in *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989). There, the total ban version of prior § 223 (b) was incapable of any narrowing construction, since Congress plainly criminalized the distribution of indecent material to consenting adults.

United States.[22] "Until the CDA, the only barrier to viewing free pornographic images on the Web was often a mouse click affirming that the viewer is of requisite age." *Id.*

This Court's precedent is unmistakably clear that the Government does have a compelling interest in protecting children from pornography. This Court articulated such an interest in *Ginsberg v. New York*, 390 U.S. at 636-43; *Pacifica*, 438 U.S. at 748-50; *Sable*, 492 U.S. at 128; *Denver Area*, 116 S. Ct. at 2391,[23] and has consistently reaffirmed it, most recently in *Denver Area*, 116 S. Ct. 2374, 2391 (1996).[24]

The court below concluded that it is "highly unlikely" that a young child will "come across" pornographic material while surfing the Web, and regarded as significant the notion that "the receipt of information requires a series of affirmative steps." 929 F. Supp. at 852. The extent to which children will affirmatively search for or inadvertently observe sexually explicit pictures on their computer screens is completely irrelevant to the issues in this case, since the compelling interest in protecting them from seeing such material remains the same in either event. *Id.* at 883.

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22 Anthony L. Clapes, *The Wages of Sin: Pornography and Internet Pornographers*, 13 No. 7 Computer Law. 1, 2 (1996).

23 Conversely, the court below did not find Internet pornography to be a serious threat to children. One judge contrasted the case to others "where the potential harm to the children was evident." 929 F. Supp. at 852. Comparing the CDA to a cure "worse than the disease," another was "hard-pressed even to identify the disease." 929 F. Supp. at 881.

24 "We agree with the Government that protection of children is a 'compelling interest.'" *Denver Area*, 116 S. Ct. at 2391. *See Pacifica*, 438 U.S. 749; *Sable*, 492 U.S. 127 ("It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling. . . . This interest extends to shielding minors from the influence of literature that is not obscene by adult standards."); *New York v. Ferber*, 458 U.S. 747 (1982).

The District Court also emphasized that "a child requires some sophistication and some ability to read to retrieve material." 929 F. Supp. at 845.[25]

These conclusions reveal the lower court's lack of recognition of the ease with which children can maneuver today's computers, especially in the point-and-click icon format of the World Wide Web which demands neither computer nor English literacy.[26]

> [I]t is relatively simple for persons of any age and modest experience with the Internet to set up their computers so that reaching repositories of pornography is as simple as selecting a TV channel.[27]

The interactive nature of this new medium, if anything, deepens the Government's interest in protecting children from access to or receipt of online pornography. That is why Congress passed the CDA.

A review of the Telecommunications Act as a whole reveals Congress's intent to expand the development of the Internet, through various means including financial incentives and discounts for schools to provide Internet access to all of American's children.[28] The goal of stimulating the growth and use of the Internet for all, including children, requires a concomitant responsibility to take steps to make the Internet

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25 Humorist Dave Barry's description of the Internet as a worldwide network of university, government, business, and private computer systems run by a 13-year-old named Jason draws a smile precisely because we acknowledge the computer literacy of children.

26 Many pornographic sites, newsgroups, and sexually oriented advertisements have sexual titles, teasers, or labels that are obviously designed to attract men. These sexual ads, titles, and index references are also an attraction to children, whose natural curiosity and immature reasoning often lure them to that which is harmful, rather than repel them from that which their parents and society knows is harmful to them. The ease with which Web browsers will find and deliver pornographic material increases their availability and consumption by the children sought to be protected by the CDA.

27 Clapes, *supra* at 2.

28 *See* the universal service provisions in Sect. 254 of the Act.

safely available to them.[29] If pornography is allowed to proliferate and is freely available to minor children, then there will be a disincentive to universal access and use of the Internet at home and in schools and libraries.[30] Therefore, Congress considered protecting children a necessary part of its interest in facilitating the growth of this important educational and social medium.[31]

III. CONGRESS CHOSE THE LEAST RESTRICTIVE MEANS OF PROTECTING CHILDREN FROM ONLINE PORNOGRAPHY.

Congress enacted the CDA because it was the least restrictive, yet effective, means of promoting its interest in protecting children from access to and receipt of patently offensive sexual and excretory depictions online.[32]

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29 The Court below also ignored that one of the goals of the Telecommunications Act was to facilitate the convergence of telecommunications resources and products. The upcoming convergence of media will present further difficulties for those who would argue that the Internet and other interactive computer systems should be exempt from the reasonable pornography regulations applied to other media.

30 *But see* Rebecca Vesely, *Library Blocks Porn, and May Block Rights*, Wired News, Jan. 7, 1997 (http://www.wired.com/com/news/story/1289.html) discussing the threatened suit by the ACLU against a Florida library which installed blocking software after users accessed pornography and left the screens in plain view of other patrons, and the American Library Association policy of discouraging libraries from using such blocking software.

31 *See* Conf. Rep. at 191, 1996 U.S.C.C.A.N. Leg Hist. at 204-05.

32 *Amici* submit that the Court should use a balancing of interests analysis, as in *Denver Area*, rather than the strict scrutiny test for an absolute ban of indecency to adults that was rejected in *Sable*, 492 U.S. at 126, 131. The CDA, however, would survive a challenge under either test. In *Denver Area*, a plurality of the Court described the suitability of the balance-of-interests test to regulations on evolving technologies: [N]o definitive choice among competing analogies (broadcast, common carrier, bookstore) allows us to declare a rigid single standard, good for now and for all future media and purposes . . . we believe it unwise and

The court below recited in its Findings of certain assertions about the nature of the Internet and conclusions that the CDA would criminalize all sexual speech, that compliance is "technologically impossible" and "economically prohibitive" and therefore not a least restrictive means, 929 F. Supp. at 854, and that the CDA will not prevent children from getting pornography and therefore it fails for underbreadth. The court held that its Findings "lead to the conclusion that Congress may not regulate indecency on the Internet at all." 929 F. Supp. at 877 (emphasis added).

This Court's precedent is to the contrary: "[O]ur cases have not left Congress or the States powerless to address the most serious problems." *Denver Area*, 116 S. Ct. at 2384. The First Amendment is committed to protecting most speech from regulation,

> but without imposing judicial formulae so rigid that they become a straightjacket that disables Government from responding to serious problems. This Court, in different contexts, has consistently held that the Government may directly regulate speech to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech.

Denver Area, 116 S. Ct. at 2385.

The decision below renders the Government helpless to do anything but hope that parents will purchase and install blocking software in the family computer, and concludes that this is all that is *necessary* to protect children from online indecency.[33] To the contrary, Congress has a compelling

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unnecessary definitively to pick one analogy or one specific set of words now." *Denver Area*, 116 S. Ct. at 2385. "[T]he First Amendment embodies an overarching commitment to protect speech from Government regulation through close judicial [rather than strict] scrutiny" to avoid "imposing judicial formulae so rigid that they become a straightjacket that disables Government from responding to serious problems." *Id.* at 2384.

[33] Contrast this finding with that of the District Court in New York that "blocking software is not widely used" and that there is "evidence that households do not tend to use existing parental control software" (in discussing the lack of defenses made available to the users by the Internet industry). 930 F. Supp. at 947-48.

interest to affirmatively protect children so that they may participate in this new and extraordinary medium, especially where private actors fail to use even the blocking and screening methods at their disposal to protect children from the domestic and foreign pornography that is available online.[34]

Inherent in a least restrictive means analysis is the expectation that the "means" are actions constitutionally taken by Congress, not by private actors. They are legislative in nature, and therefore mandatory—never voluntary.[35] Hypothetical, ad-hoc ways for private individuals to address the problems in which Government has a compelling interest are inapposite to the means by which Government may attempt to promote its compelling interest. [36] "[P]arents and others . . .

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[34] Moreover, if the Government were to do nothing to prevent children's access to online pornography, this abandonment would itself contribute to the harm about which the Government has a compelling interest. In *Ginsberg*, 390 U.S. at 643, the Supreme Court quoted Dr. Gaylin of Columbia University Psychoanalytic Clinic on the harmful impact of sexually explicit material on minors, wherein he emphasized that the harm to children *from being permitted* to view pornography was conceivably "as potentially destructive" as the actual viewing of it. "The child is protected in his reading of pornography by the knowledge that it is pornography, i.e. disapproved." *Id.* "To openly permit implies parental approval and even suggests seductive encouragement. If this is so of parental approval, it is equally so of societal approval—another potent influence on the developing ego." *Id.* In *Ginsberg*, therefore, the Court understood that an essential part of the Government's furthering its compelling interest in protecting children from exposure to pornography is the "official" societal disapproval manifested through laws not only against children consuming pornography, but especially against adults providing it to them.

[35] Just as arguing that "protecting children from indecency only at the caprice of the cable operator is not compelling," *Denver Area*, 116 S. Ct. at 2416, neither is the Government's interest in protecting children from indecency only by the ad-hoc, voluntary actions of some private actors.

[36] The law does not require child safety to be left entirely to the hope or trust that "someone" will protect children from harm. *Pacifica*, 438 U.S. at 744 n. 19: "We are assured by Pacifica that the free play of market

who have th[e] primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." *Dial Information Services v. Thornburgh*, 938 F.2d 1535, 1541 (2nd Cir. 1991), *cert. denied* 502 U.S. 1072 (1992). *See also Information Providers' Coalition v. FCC*, 928 F.2d 866 (9th Cir. 1991).

It stretches the limits of logic and legal precedent to suggest that the Government may take steps to fulfill its compelling interest in protecting children from pornography in every medium, including print, video, television, radio, and the private telephone, but the Government may do *nothing* to further its compelling interest where pornography reaches children by online computers, faxes, videophones, and other interactive computer services and telecommunication devices. Further, it has the untenable and intolerable result that even direct, knowing transmissions of pornography to a known child must be tolerated because "the Government may not, through the CDA, interrupt that [world-wide Internet] conversation." 929 F. Supp. at 883. Absent from the opinion below is any discussion acknowledging that it is fundamentally wrong for adults to knowingly give pornography to children.

As a matter of law, Congress has an independent interest in protecting children from exposure to or receipt of patently offensive sexual or excretory depictions, and is not required and should not be compelled to rely on the private, voluntary actions of others, such as parents,[37] but can encourage their assistance.

Plaintiffs below proffered parental screening software products as a less restrictive alternative to the CDA. Even if they were relevant, however, such actions are not effective,[38]

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forces will discourage indecent programming. . . . [T]he prosperity of those who traffic in pornographic literature and films would appear to justify skepticism."

[37] *Dial Information Services*, 938 F.2d at 1542.

[38] Computer industry reviewers have found that filename-based Cybersitter does not block cryptic titles, word-based Net Nanny does not block pornographic images, and SurfWatch does not work on non-Internet

and therefore do not constitute a less restrictive but "as effective" alternative to the CDA.[39]

Although all parents, schools, and libraries may and should make use of whatever software products are available (*i.e.* X-Stop, Library Safe, Cyber Patrol, Rated-PG) to gain whatever benefits that they can offer, not all parents will purchase such software, and, even if they do, children have access to many computers which will not employ software filtering devices such as in schools, libraries, and neighbors homes.[40]

That the CDA rests the burden of compliance upon the speaker of patently offensive sexual or excretory depictions and not on the consumer of these depictions, including children, not only carries the weight of unanimous precedent, but also has the benefit of being highly practical.[41] Law and logic compel the conclusion that, as between speaker and consumer, the speaker is in the better position to know the content of his speech. Plaintiffs would transfer the obligation from those who are in the best position to know whether something is a patently offensive sexual or excretory depiction

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sources, such as BBSs. *See PC Magazine*, Nov. 7, 1995. It is worth noting that one of the Plaintiffs automatically provides screening for sexual sites when initially subscribing, Microsoft Network (MSN), and then allows an adult credit card holder to disable any or all of the screening levels. The other Plaintiffs who are ISPs or online service access providers place no restrictions on the pornography the children subscribers can access but merely make such software "available."

[39] In *Dial Information Services*, 938 F. 2d at 541, the court found that "in order for appellees to prevail, it must be determined that there are other approaches less restrictive than the Helms Amendment but *just as effective* in achieving its goal of denying access by minors to indecent dial-a-porn messages." (Emphasis added.)

[40] Moreover, many children are capable of out-maneuvering such technology, and the proficiency with which pornographers evade prohibitions to their conduct will be further improved by new means of technological deception, especially if untempered by any legal restraint.

[41] The court in *Dial Information Services*, *supra*, upheld the requirement that the "speaker" of indecent telephone speech bear the burden of keeping his speech away from children, despite the existence of commercially available blocking devices for the home.

to the consumers, who must search, find, identify, and then attempt to block the hundreds of thousands of available pornographic images from their children.

Steps like parental involvement in their children's use of the Internet, the installation of filtering software, and content-rating protocols are each important elements in protecting children on the Internet. These self-help measures should be regarded as complements to the CDA, much as the parental admonition, "don't talk to strangers" complements laws against kidnapping. None of them, however, individually or in the aggregate, eliminates the need for legal prohibition of sending or displaying pornography to children, or supplants Congress's constitutional authority to take action in furtherance of its compelling interest.

IV. COMPLIANCE WITH THE CDA IS FEASIBLE AND NOT TECHNOLOGICALLY IMPOSSIBLE.

The flexibility and capability of Internet technology makes few, if any, desired goals impossible to attain. The CDA restrictions and defenses were designed with this flexibility and potential for creativity in mind.

Under the challenged sections of the CDA, it is not a crime for adults to provide online indecency to other adults, consenting or not. Furthermore, even if a child does obtain patently offensive sexual or excretory depictions, it is a defense to criminal or civil liability, under § 223 (e)(5) and (f)(1), that the provider of the depictions took good faith actions under available technology to limit such depictions to adults. Such good faith actions are an essential aspect of this law, both legally and technologically. The CDA is a technology flexible statute that allows pornography providers to take actions with the means now available, but expects that more will be done when more can fairly be done.[42]

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[42] The sponsors of the CDA and the Conferees purposefully sought this type of interpretation by defining good faith defenses as "any method which is feasible under available technology" in § 223(e)(5)(A), and

The defenses provided in the CDA are both all inclusive of true good faith efforts and allow for more defenses than are available under any other federal indecency law, including broadcasting, cablecasting, or dial-a-porn. The CDA not only incorporates the defenses applicable to the dial-a-porn offenses in § 223 (b) and (c), which were promulgated by the FCC and specifically referred to with approval by this Court in *Sable*, but also provides good faith defenses to those who take steps of their own device or pursuant to any future FCC regulation in order to protect children from accessing their patently offensive sexual or excretory depictions. The CDA's criminal and civil immunities for good faith and "Good Samaritan" acts are available to those who take affirmative steps to restrict indecency from minors, not for taking no action.

The court below granted the injunction against the CDA in part because it concluded that compliance is "either technologically impossible or economically prohibitive for most plaintiffs."[43] The lower court overestimated the difficulties of compliance with the CDA and underestimated the capabilities of interactive computer technology. One of the ways in which the court below distorted the problem of compliance was in its misconstruction of the indecency standard to include communications related in any way to sexuality, which, as stated above, is a patent misapprehension of the constitutional parameters of indecency and the stated intent of Congress. And to proceed, as the lower court did, from the observation that the "the strength of the Internet is [its] chaos" is to misunderstand the true systematic orderliness of the Internet.

It is certainly difficult to relate the observation that compliance is "either technologically impossible or economically prohibitive" to the prohibitions of subsection 223(a)(1)(B) and (d)(1)(A) against knowingly sending indecent material directly to a known child. *Amici* submit that, in light

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providing in § 223(e)(6) for FCC assistance in helping industry and users define, develop, and protect themselves with new defenses. *See also* Conf. Report 1996 U.S.C.C.A.N. Leg. Hist. at 204.

[43] 929 F. Supp. at 854.

of the scienter element, there is no legal or logical reason for finding these direct transmission crimes facially unconstitutional. This Court's precedent, from *Ginsberg* to *Pacifica* to *Sable,* is unequivocally clear about the constitutionality of such a prohibition.

In addition, Judge Sloviter concluded below that it would be a "burden . . . impossible to sustain" (929 F. Supp. at 856) for people online to review their content for patently offensive sexual or excretory depictions. Such a conclusion, if accepted here, would seem to render infeasible *any* Internet regulation, and certainly other pornography-related prohibitions to which Plaintiffs have made no challenge. Internet content and access providers are no more or less able to evaluate their material pursuant to obscenity and child pornography laws which apply online than they would be pursuant to the CDA.

> Since content and service providers must provide solutions to the problem of obscenity and child pornography and since those solutions are likely to be equally effective in regulating indecent or patently offensive expression as well, the technological impossibility argument is not necessarily a persuasive argument, either factually or legally.[44]

That reasonable methods of compliance are technologically feasible is further demonstrated by the fact that many sites are now screening children from access to pornographic materials. There will undoubtedly be more ways to comply in the future, especially when the market is encouraged by the presence of a legal obligation.[45] While evolving technologies are increasing and improving the means of restricting pornography from children, and the FCC can lend its expertise in defining further good faith defense measures

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[44] Clapes, *supra,* at 8.

[45] Curiously, while the court below gave great weight to the possibility that "a reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material *will soon* be widely available," the prospect of future developments in age-verification was considered irrelevant. 929 F. Supp. at 842. (Emphasis added).

pursuant to subsection 223 (e)(6), it should not be a matter for dispute that there are sufficient and adequate means already available under present technology for adults to keep their patently offensive sexual or excretory depictions from minors.

The act does not require the impossible, but only requires reasonable, effective, and appropriate actions to prevent children's access to or receipt of pornography. The lower court overlooked a variety of "no tech" and "low tech" means to comply with the CDA as simple as knowing who you are communicating with, channeling indecent communications to "adults only" areas, and utilizing contractual obligations between subscribers and access providers for monitoring.

Other potential means of compliance include system-wide protocols for screening children's access, server-level filtering software, mechanisms which allow content providers to identify adult visitors to their sites, pages, or GIFs, and digital IDs for adults or minors that could provide an age to visited sites, age-tagging programs or protocols, such as the successful "-L18" program illustrated in the hearing below, or an adaptation of the next generation's Internet Protocol for address and routing packets ("IPv6") to code for age in its expanded header extensions for authentication and privacy capabilities,[46] a modification of the existing "finger" program for requesting visitor identification which could be relayed back to the visitor's Internet Service Provider ("ISP") for a reply that the subscriber is of a certain age without giving a name (thus preserving anonymity protections for children).

Although not added to the Findings, it was admitted in the opinion below that sites on the World Wide Web have the present capacity to use "cgi scripts" to exclude minors from accessing pornography. 929 F. Supp. at 854. This situation is likewise with the Usenet, where much of the most graphic and notorious pornography is made available, both hard- and soft-

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[46] *See* "Internet Protocol, Version 6 Specification," RFC 1883, Network Working Group, Deering & Hinden, Dec. 1995, p. 2, 5, 7 (http://ds0.internic.net/rfc/rfc1883.txt); *Byte*, Sept. 1996, "The New and Improved Internet Protocol" (describing new, 128 bit length to replace 32)

core, normal and perverted, actual and simulated. The Findings below describe the Usenet as an open and uncontrolled medium, yet each Internet service or access provider must choose which Usenet feeds to accept. The Plaintiffs did not disclose, and the court failed to find, that the Usenet is actually a privately owned, proprietary, commercial subscription service with closed access and control over each newsgroup, moderated or not, by an administrator. If an ISP does not subscribe to a particular hierarchy or newsgroup feed, it cannot be accessed by customers through that ISP, who would read the groups from the ISP's local server rather than from some remote server or Usenet backbone server somewhere else.[47] The Usenet is totally within the control of the ISP, who could be subject to prosecution for obscenity, child pornography, stalking, and even providing known access to minors, since this is not a "common carrier" service and not within the exemption of § 223 (e)(1).[48]

Moreover commercial online services must decide which commercial services to subscribe to, such as encyclopedias, news, financial data services, Usenet hierarchies, or other special interests. Many commercial Bulletin Board Services do the same and either use the Internet to advertise their BBS telephone number or contract to have their board's content offered by a commercial online content or access provider. Such contractual arrangements are obviously and legally subject to control and existing technology could be used to screen for minors on any such subscription services that would contain pornography.

This Court in *Sable, supra*, 492 U.S. at 126-27, recognized the constitutionality of compliance by making private arrangements with third parties.

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47 See the following archive documents for Usenet ownership, control, protocol, and descriptions: "creating newsgroups," "info-center-faq," "posting-rules," "site-setup," "social-newsgroups," "what-is" (accessible from: http://rtfm.mit.edu/pub/usenet-by-hierarchy/news/answers/usenet/).

48 *See also OCAF White Paper on Internet Pornography* (posted on the Internet on Feb. 2, 1996, at: noporn@mailback.com).

> Whether *Sable* chooses to hire operators to determine the source of the calls or engages with the telephone company to arrange for the screening and blocking of our-of-area calls or finds another means for providing messages compatible with community standards is a decision for the message provider to make.

The commercial, educational, institutional, and corporate online service providers, in addition to acting as ISPs and providing access to the Internet and World Wide Web, can and often do, offer other material over which they have absolute editorial control (such as services, boards, chat rooms, and pages). A service provider must also exercise conscious and deliberate subscription control over which commercial or privately owned services it will take onto its own servers in order to re-offer it to its customers or users.

In all of these instances, every Internet service and access provider can use available server-level screening software to protect the children on their computer systems from pornography. Though the first generation end-user programs were unreliable, as the "online demonstration" in the hearing which failed below illustrates, the next generation server-based applications offer better protection, and ISPs should employ software for minors on their systems, and leave it to parents to unblock if any parent so chooses.

Some members of the industry may consider solving the problem to be against their economic interests.[49] Whether the defenses are economically unpleasant is not dispositive for First Amendment analysis. The Court in *Sable, supra*, 492 U.S. at 126-27, made it clear that compliance costs for the providers of patently offensive sexual or excretory depictions do not affect the constitutionality of the statute:

> While Sable may be forced to incur some costs in developing and implementing a system for screening the locale of incoming calls, there is no constitutional

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49 As a practical matter, whoever offers technical means for automated, safe Internet access for the millions of children in the U.S. and around the world would likely be able to make millions of dollars.

impediment to enacting a law which may impose such costs on a medium electing to provide these messages.[50]

While those who provide patently offensive sexual or excretory depictions may well incur some costs in order to attempt to screen their depictions from children, the cost to children of their failure to do so is incalculable.

In light of the possibilities for complying with the CDA's limited requirements, the assertion of impossibility may portend simply an unwillingness to undertake the effort.

CONCLUSION

Each time pornographers break through a new barrier, society's best reaction should be the honorable one—to protect the children first. As one of the CDA's original sponsors said on the day this law was enacted by the Congress:

> *Sometimes our technology races beyond our reflection, and we are left with a dangerous gap—a period when society is unprepared to deal with the far-reaching results of rapid change. That is the situation we have on the Internet. This is the situation which [the CDA] will address.*[51]

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50 The Court of Appeals for the Ninth Circuit recently held that decreased profits and costs of market participation are not adequate grounds for a First Amendment challenge in *Spokane Arcade, Inc. v. City of Spokane*, 75 F.3d 663, 96 (9th Cir. 1996).

51 Remarks of Senator Dan Coats, 142 Cong. Rec. S.707 (daily ed. Feb. 1, 1996).